No. 86-1972

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

---

NATIONAL FOOTBALL LEAGUE, *et al.*,
*Petitioners,*

v.

OAKLAND RAIDERS, LTD., AND LOS ANGELES MEMORIAL COLISEUM COMMISSION,
*Respondents.*

---

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---


SKADDEN, ARPS, SLATE, MEAGHER & FLOM
FRANK ROTHMAN
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

COVINGTON & BURLING
*DANIEL M. GRIBBON
JOHN H. SCHAFER
PAUL J. TAGLIABUE
LYLE JEFFREY PASH
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-6000

*Attorneys for National Football League Petitioners*


August 1987

*Counsel of Record

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| I. This Court Can And Should Review All Proceedings In The Court Below | 1 |
| II. The Status Under Section 1 Of The Sherman Act Of Restraints Ancillary To The Conduct Of A Lawful Joint Venture Should Be Clarified | 3 |
| III. The Coliseum Lacks Antitrust Standing To Recover Damages For A Restraint In A Market In Which It Is Neither A Competitor Nor A Consumer | 8 |
| CONCLUSION | 10 |

## TABLE OF AUTHORITIES


Page

CASES:

*Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519 (1983) ..... 9

*Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982) ..... 8, 9

*Boating Industry Ass'ns* v. *Moore*, 106 S. Ct. 218 (1985), *vacating and remanding*, 754 F.2d 698 (7th Cir.), *rev'd on remand*, 1987-1 Trade Cas. (CCH) ¶ 67,568 (7th Cir. 1987) ..... 7

*Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ..... 4

*Cincinnati Packet Co.* v. *Bay*, 200 U.S. 179 (1906) .. 5

*Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927) ..... 5

*Continental TV, Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) ..... 4

*Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) ..... 4

*Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981) ..... 2

*Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251 (1916) ..... 2

*Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) ..... 2

*Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973) ..... 2

*Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941) ..... 2

| | Page |
|---|---|
| *Mercer* v. *Theriot*, 377 U.S. 152 (1964) | 2 |
| *National Basketball Ass'n* v. *SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987) | 4, 5 |
| *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1984) | 4 |
| *National Football League* v. *Oakland Raiders, Ltd.*, 469 U.S. 990 (1984) | 1 |
| *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978) | 5 |
| *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) | 6, 7 |
| *Reece* v. *Georgia*, 350 U.S. 85 (1955) | 2 |
| *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987) | 2, 3, 4, 5, 6 |
| *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983) | 9 |
| *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899) | 3, 5 |
| *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 433 U.S. 658 (1979) | 2 |
| OTHER AUTHORITIES: | |
| II P. Areeda & D. Turner, *Antitrust Law* ¶ 340(e) (1978) | 9 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

**No. 86-1972**

NATIONAL FOOTBALL LEAGUE, *et al.*,
*Petitioners,*

v.

OAKLAND RAIDERS, LTD, AND LOS ANGELES MEMORIAL COLISEUM COMMISSION,
*Respondents.*

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This case presents issues of overriding significance for joint ventures and other business entities integrated by contract and engaged in a common endeavor. The holdings of the court below are in serious conflict with decisions of this Court and other courts of appeals. They graphically illustrate the difficulties encountered by the lower courts in passing upon "business practices in an industry which does not readily fit the antitrust context" (Pet. 66a) and clearly establish the need for guidance by this Court.

### I. This Court Can And Should Review All Proceedings In The Court Below

The Raiders' principal argument, adopted by the Coliseum, is that this Court's denial of certiorari from the Ninth Circuit's affirmance of the trial court's injunction, *National Football League* v. *Oakland Raiders, Ltd.*, 469 U.S. 990 (1984), precludes granting this petition. (Raiders Br. 2-6; Coliseum Br. 4 n.2) This restrictive view of the Court's jurisdiction is erroneous and has been rejected in many prior decisions of the Court.

This Court has long held that a writ of certiorari may issue to review and correct all errors in the proceedings below. *See, e.g., Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 257-58 (1916). Thus, in *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 488 n.6 (1968), this Court reviewed both liability and damages issues in an antitrust case notwithstanding its earlier denial of certiorari on a key liability issue, the so-called "passing-on defense", which had been separately tried under Rule 42(b). Similarly, in *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363 (1973), the Court had granted certiorari but after argument dismissed the writ as improvidently granted. 380 U.S. 248 (1965). Nonetheless, the Court proceeded to hear the entire case on a second petition, noting that "[t]he prior dismissal did not establish the law of the case or amount to *res judicata* on the points raised." 409 U.S. at 365 n.1.[1]

Inherent in the opinion of the court below on damages is a reaffirmance of its earlier finding of antitrust liability, (*e.g.*, 13a, 28a) without which there would be no basis for a damage award. As demonstrated by *Hanover Shoe*, there is nothing about a bifurcated proceeding that deprives this Court of jurisdiction to review all of the substantial federal questions determined at any stage of the litigation.[2]

Moreover, one of the principal reasons for granting certiorari in this case is the direct conflict between the decision below and the decision in *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987). This conflict arose since the first petition was before the Court, and nothing in the Court's prior practice suggests that it cannot now resolve that conflict.

---

[1] *See also* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 672 n.19 (1979); Mercer v. Theriot, 377 U.S. 152, 153-54 (1964); Reece v. Georgia, 350 U.S. 85, 87 (1955); Indianapolis v. Chase National Bank, 314 U.S. 63, 71, 72 (1941).

[2] The Raiders' reliance on Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), (Raiders Br. 6) is misplaced. Petitioners have not sought to bring a second action to obtain relief already denied, as was the case in *Moitie*. Here the NFL seeks timely review of substantial errors committed in both the liability and damages phases of a single lawsuit. Nothing in *Moitie* or in the general principles of *res judicata* supports the Raiders' constricted view of this Court's jurisdiction.

Nor should the Court be misled by the Coliseum's effort to trivialize this case, (Coliseum Br. 5) an effort in which the Raiders, significantly, do not join. Resolution of the issues presented by this petition, which are of great importance not only to sports leagues and similar business entities, but to communities, taxpayers and the public, depends upon legal principles that are yet to be clearly articulated.

## II. The Status Under Section 1 Of The Sherman Act Of Restraints Ancillary To The Conduct Of A Lawful Joint Venture Should Be Clarified

A. Neither respondent addresses the central issue presented by the decisions below: Whether an agreement ancillary to the lawful joint production of a single product by firms "that are not true competitors," is proscribed by Section 1 of the Sherman Act. Neither respondent even mentions *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), the fount of the analysis applied by the District of Columbia Circuit in *Rothery*. Instead, both attempt to obscure the issue by claiming that the League seeks an immunity from Section 1. (Coliseum Br. 5-9, Raiders Br. 8-10) No such immunity is sought by this petition.

The Raiders operated in Oakland because the members of the National Football League made a joint decision to conduct League operations in Oakland. The Washington Redskins play in Washington rather than in Memphis or some other city because of a similar joint decision by the NFL member clubs. Decisions such as where the venture will and will not conduct its business are inherent in and fundamental to the operation of a sports league and to the joint production of the League's professional football product. Thus, the court below correctly recognized that (a) the League is a lawful joint venture, (Pet. 74a) (b) its territorial rules are ancillary to this lawful joint venture agreement, (*id.*) and (c) the League members "are not true competitors, nor can they be." (Pet. 67a) But it ignored these economic realities and treated Rule 4.3 as a naked restraint among ordinary business rivals.

To rule, as petitioners urge, that the member clubs' decisions on team location are ancillary to the conduct of their lawful joint venture, would not, as both respondents argue, create some broad immunity from the Sherman Act, any more than the decision in *Rothery* gives interstate van lines Sherman Act immunity. Such a holding would apply only to intra-enterprise agreements that create efficiencies in the joint conduct of the enterprise. It would have no application to independent actions by individual League members. (Cf. Coliseum Br. 6-7; Raiders Br. 9-10.)

Respondents strive to limit to its precise facts this Court's decision in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). (Coliseum Br. 6-8; Raiders Br.10) That decision, however, as the Court's analysis clearly discloses, is one of a series of recent cases in which the Court has directed that the economic realities of business arrangements and transactions should govern the application of the antitrust laws. *See National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Continental TV, Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). Moreover, in *Copperweld* this Court specifically overruled certain of its earlier decisions upon which the court below relied heavily in ignoring acknowledged ancillary restraints and applying Section 1 of the Sherman Act to agreements between firms that are not competitors. (Pet. 13 n.16)

B. Neither respondent effectively addresses the conflict between the decision below and the decision of the District of Columbia Circuit in *Rothery*. In *Rothery*, the court upheld a limitation on competition between members of a lawfully integrated enterprise *for the business the enterprise sought to attract*. That is precisely the character of limitation the League imposed upon the Raiders with respect to the League's business in Los Angeles. The manner in which the court below viewed such a limitation in this case and the approach of the court in *Rothery* are in direct conflict.[3]

---

[3] The Coliseum cites National Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562 (9th Cir. 1987), in an effort to discount the

*(Footnote continued on next page)*

Respondents attempt to dismiss Judge Bork's analysis in *Rothery* as "dicta" or as based on "factual dissimilarities." (Coliseum Br. 9, 10; Raiders Br. 7) Those dissimilarities are not identified by either respondent, nor do they explain why there should be one rule of law for interstate van lines and another for professional sports leagues. Sports leagues are contractually integrated enterprises in an even more fundamental way than the van lines in *Rothery:* while each van line was capable of providing interstate transportation service in competition with other van lines, NFL football can only be produced through the joint action of all the League members. None can produce it individually. The Raiders' opposition simply repeats the error the court below made in holding that restraints ancillary to the conduct of a lawful joint venture are subject to the same rule of reason review used to evaluate naked restraints among horizontal competitors.[4]

*Rothery* applied the analysis of *Addyston Pipe* to hold that the antitrust inquiry is properly limited to whether a restraint is ancillary to a lawful contractual integration.[5] Such restraints need not be evaluated under the "pro" vs. "anti" competitive test of the rule of reason. *See National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978). The opinions

---

*(Footnote continued from previous page)*
decision in this case as unique and not worthy of this Court's attention. However, the *NBA* case directly confirms the circuit split on which much of this petition is based. The Ninth Circuit in *NBA* states that "antitrust analysis under *Raiders I* indicates that the question of what restraints are reasonable is one of fact." 815 F.2d at 568. This is *precisely* the contention that was rejected by the District of Columbia Circuit in *Rothery. Rothery* holds that a restraint ancillary to the conduct of a lawful joint venture is to be judged by a different legal standard than an agreement between competitors. 792 F.2d at 229-30 and n.11.

[4] The reasoning of the District of Columbia Circuit in *Rothery* offers an analysis supporting the conclusion of the Antitrust Division that intra-league relocation rules "should be deemed *per se* lawful" (Pet. 137a) and that *ad hoc* jury review of these agreements has led to an "antitrust 'cure' [that] was worse, in terms of damage to the marketplace, than the competitive 'disease' at which it was aimed." (*Id.* 139a)

[5] The Court has approved this view of Section 1 of the Sherman Act, both prior to setting forth the rule of reason, Cincinnati Packet Co. v. Bay, 200 U.S. 179, 185 (1906), and after its adoption. Cline v. Frink Dairy Co., 274 U.S. 445, 461-62 (1927).

below hold, however, that in reviewing such restraints under Section 1, a jury may condemn them without reference to their efficiency role in the conduct of a lawful joint venture. This conflict with *Rothery* is glaring and should be unacceptable. If the Washington Redskins should decide to move to New York without League approval, *Rothery* would be authority for an injunction against the move in the District of Columbia Circuit. In the Ninth Circuit, however, the League not only could not secure an injunction, but any steps to prevent such a move would subject the League to a treble-damage jury trial.

At the very least, the court below erred seriously in refusing to give the jury any instruction with respect to the treatment of ancillary restraints under Section 1 of the Sherman Act. The Coliseum does not even attempt to defend the lower court's treatment of this issue. The Raiders say only that the trial court did not require that the League rule be the *least* restrictive alternative available, and therefore gave the NFL the benefit of an ancillary restraints analysis. (Raiders Br. 8) But ancillary restraints principles look to the role of a restriction in the context of a larger venture. Here the lower court instructed the jury to determine the legality of the location under a simple "pro" vs. "anti" competitive test and specifically declined to mention ancillary restraints although requested to do so by the League.

C. Apart from the mistaken refusal of the court below to apply proper legal analysis to a recognized ancillary restraint, the affirmance of a finding of antitrust liability based on procedural defects in the League's administration of its relocation agreement was similarly in error and in conflict with recent holdings of this Court.

The Raiders' suggestion that procedural safeguards played no role in the Ninth Circuit's decision (Raiders Br. 11) is belied by both opinions of the court below. Both the liability opinion (Pet. 77a to 79a) and the damages opinion (Pet. 28a) make clear that perceived procedural defects in the application of Rule 4.3 were critical to the finding of an antitrust violation.

Both respondents contend that this Court's decision in *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), is inapposite because, as

petitioners recognized, (Pet. 19) that case overturned a finding of a *per se* violation of Section 1. (Coliseum Br. 10-11; Raiders Br. 10) But neither respondent explains why the analysis underlying that decision is not equally applicable to a rule of reason inquiry. As this Court held in *Northwest Wholesale Stationers,* "the absence of procedural safeguards can in no sense determine the antitrust analysis." 472 U.S. at 293. "[B]ecause the antitrust laws do not themselves impose upon joint ventures a requirement of process" (*id.*), a reasonable restraint does not suddenly become unlawful merely because of the manner in which it was imposed. And similarly, an unreasonable restraint would not be saved by dressing it in procedural niceties. The Court should state clearly that this is as true in a rule of reason analysis as in a case where a *per se* violation is claimed.[6]

The Coliseum argues that procedural matters were irrelevant to the decisions below and that Rule 4.3 was invalidated because it restrained competition between the Raiders and the Rams. (Coliseum Br. 11) But the court below found both that the League members "are not true competitors, nor can they be" (Pet. 67a) and that the relocation agreement promoted substantial League interests. (Pet. 75a to 76a) It was only the procedural defects in the application of Rule 4.3 that made it *unreasonable* to prevent competition between the Raiders and the Rams.[7]

---

[6] In Boating Industry Ass'ns v. Moore, 105 S. Ct. 218 (1985), which is ignored by both respondents, this Court vacated and remanded a holding of the Seventh Circuit that a judgment of antitrust liability could be based on procedural shortcomings. In that case, both the trial court and the Seventh Circuit had made clear that the holding was not dependent on whether the violation was characterized in *per se* or rule of reason terms. 754 F.2d 698, 706 (7th Cir. 1985). Following this Court's remand, the Seventh Circuit reversed the jury verdict in that case. 1987-1 Trade Cas. (CCH) ¶ 67,568 (7th Cir. 1987).

[7] The restraint on peripheral competition between the Raiders and the Rams in Los Angeles would, of course, have been the same irrespective of the procedures employed by the member clubs in evaluating the transfer request. The Court of Appeals' emphasis on procedural due process ultimately led it to decide the case on a basis having little or nothing to do with the competitive effects of the League's relocation policy.

## III. The Coliseum Lacks Antitrust Standing To Recover Damages For A Restraint In A Market In Which It Is Neither A Competitor Nor A Consumer

The Coliseum, like other prospective suppliers, might have benefitted commercially had the Raiders moved in 1980. This fact, however, does not establish standing under the antitrust laws, and dressing up the claim to portray the Coliseum as a competitor in a "stadia" market does not cure the defect. The Coliseum's inability to attract the Raiders to Los Angeles was obviously only a remote and indirect consequence of the only conceivable Sherman Act violation in this case, *i.e.*, that the Raiders were prevented from competing against the Rams in Los Angeles. If the Coliseum can avoid the established rules of antitrust standing by simply labeling the line of commerce in which it operates a "market," it will be a singularly uninspired plaintiff's attorney who does not claim that his client was restrained from competing in whatever market that client operates.

Nor does the Coliseum's professed "indispensable and intimate connection" with professional football serve to confer standing that otherwise does not exist.[8] The description, even if correct, clearly has no logical bearing on the basic issue of standing—whether the plaintiff is directly enough injured by the wrong to be allowed to recover. Moreover, parking lot concessionaires, ushers, TV and radio stations, and other suppliers of goods and services could similarly claim to be "indispensable" to the presentation of professional football. It is impossible to tell from the opinion below what facts establish that the Coliseum

[8] Relying on Blue Shield of Virginia v. McCready, 457 U.S. 465, 483-84 (1982), the Coliseum argues that its "indispensable and intimate connection with professional football and football teams" independently confers on it standing to sue. (Coliseum Br. 16-17) The Ninth Circuit did not mention *McCready* in upholding the Coliseum's standing, and it is clear that the holding below is dependent entirely on the existence of a separate "stadia market." The very sentence that the Coliseum quotes (at pages 16-17 of its brief) states in full that "Football stadia constitute a *separate market* distinguished from those comprised by, say, hotels, laundering establishments, or limousine services, by their indispensable and intimate connection with professional football and football teams." (13a) (emphasis added)

had such an "intimate connection" with professional football as to entitle it to a treble-damage recovery, but it is clear that such a test would result in an utterly unworkable rule of law.

This Court's observation in *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 536 (1983), that it is virtually impossible to announce one rule of law applicable to all cases, so heavily relied upon by the Coliseum, does not justify the decision below. The lower courts have long ago resolved that prospective suppliers to those affected by an antitrust restraint, such as landlords, do not have standing in that capacity to maintain an antitrust action. II P. Areeda & D. Turner, *Antitrust Law* ¶ 340(e) (1978); see also cases cited at Pet. 23 n.24.

The Coliseum's effort to distinguish the holding of the Sixth Circuit in *Southaven Land Co.* v. *Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir. 1983), (Coliseum Br. 17-18) simply underscores the error of the court below. Just as the Coliseum, a potential lessor of premises, is neither a consumer nor a competitor in a football or entertainment market, the landlord in *Southaven* was neither a consumer nor competitor in the retail grocery market. In short, neither was a participant in the market in which defendants acted and in which the impact of the alleged restraint was felt. Notwithstanding the fiction of a "stadia market," there is no meaningful difference between the Coliseum and the plaintiff in *Southaven*.[9] The holding that the Coliseum is entitled to recover treble damages is at odds with this Court's holding in *Associated General Contractors*, and with the decision of the Sixth Circuit in *Southaven*. It is further inconsistent with the analysis of standing employed by the Third, Fifth, Eighth, and Eleventh Circuits. (Pet. 23)

---

[9] The Coliseum also argues that the disappointed lessor in Southaven was denied standing because it was not the instrument by which the restraint on competition in the grocery market was effected. (Coliseum Br. 17-18) Of course, the same is true of the Coliseum. The Coliseum was not the instrument by which a restraint was imposed on the Raiders. As the Coliseum's counsel argued to the jury, the League took steps to prevent the Raiders from moving to Los Angeles. (Pet. 22 n.23) In doing so, the Coliseum was indirectly injured. But no action was taken against the Coliseum and in no sense is the stadium more central to the challenged restraint than was the lessor in *Southaven*. *Compare McCready*, 457 U.S. at 483-84.

## CONCLUSION

The legal principles on which the decisions of the court below are grounded, both in applying Section 1 of the Sherman Act to ancillary restraints in the conduct of a joint venture by firms that "are not true competitors," and in awarding antitrust damages to an onlooker, are of broad importance and are in conflict with decisions of this Court and of other courts of appeal. Accordingly, a writ should issue to grant those decisions plenary review.

Respectfully submitted,

COVINGTON & BURLING
DANIEL M. GRIBBON
JOHN H. SCHAFER
PAUL J. TAGLIABUE
LYLE JEFFREY PASH
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
FRANK ROTHMAN
300 South Grand Avenue
Los Angeles, California 90071
(213) 687-5000

August 1987